ABU MANSOR MOHD. BASIR

v.

BANK KERJASAMA RAKYAT (M) BHD. & ANOR.

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
MOHD. AZMI J
HASHIM J
[CIVIL APPEAL NO. 12 OF 1978]
15 JANUARY 1982

CIVIL PROCEDURE: *Ex parte order of attachment before judgment - Application to set it aside - Whether insufficiency of evidence on which order could have lawfully been made - Other ex parte orders requiring declaration of assets and of injunction - Whether outside the scope of s. 19, Debtors Ordinance 1957.*

This was an appeal against the decision of a Judge dated 23 January 1978 dismissing the appellant's application to set aside an *ex parte* order of attachment before judgment made on 16 November 1977 in respect of the movable properties of the appellant subject to a limit of RM8.3 million. The *ex parte* order of 16 November was made pursuant to s. 19 (1)(c) of the Debtors Ordinance 1957, at the instance of the two respondents who were the plaintiffs in Kuala Lumpur High Court Civil Suit No. 2110/77 in which the appellant was being sued with four others namely Datuk Harun bin Hj. Idris, Ismail bin Din, Tinju Dunia Sdn. Bhd. and Citibank N.A.

By para. I of the statement of claim endorsed in the general writ of summons issued on 22 July 1977 in reference to the said civil suit, the first respondent's claim against the appellant, the first and third defendants jointly and severally, is for the sum of RM7.7 million. By para. 4, the second respondent's claim against the appellant is for the sum of RM8.3 million or such other sum as may be found due for loss caused or occasioned to the second respondent by him by breach of trust, alternatively by breach of fiduciary duties or further alternatively by fraud committed on the second respondent.

The respondents' *ex parte* summons in chambers was supported by two affidavits - one sworn by Ibrahim bin Hashim, the general manager and secretary of the first respondent bank, and the other by Zubir bin Haji Dahan, the acting secretary of the second respondent company. Counsel for the appellant argued that there was insufficient evidence in the affidavits on which an order of attachment before judgment could have been lawfully made. It was also argued that the other *ex parte* orders made on the same date directing the appellant to declare on oath full particulars of his movable and immovable properties and an injunction restraining him until the trial of the civil suit from exercising any powers or rights which he might have as a director or shareholder in any company were beyond the scope of s. 19 of the Debtors Ordinance 1957.

The main issue for determination in this appeal is whether there was any evidence or sufficient evidence based on the affidavits sworn on 14 November 1977 on behalf of both the respondents that (a) the respondents had a good cause of action against the appellant; (b) the appellant had handed over a great deal of his property or money to others; and (c) he did so with intent to obstruct or delay any judgment the respondent might have.

Held:

[1] Section 19 (1)(c) does not debar a man from dealing with his property merely because a suit has been filed against him. There must be additional circumstances before the Court can be satisfied that he was disposing of his property during the pendency of the proceedings with intent to defraud the plaintiff.

[2] There was clearly sufficient evidence before the learned Judge to be satisfied that the respondents had a good cause of action against the appellant for breach of trust, breach of fiduciary duties and breach of contract of services. But, besides proving that they had a good cause of action, the respondents must also prove that the appellant had handed over a great deal of his property or money to others and he did so with intent to obstruct or delay any judgment the respondents might have and this the respondents had not done. There was insufficient evidence on oath before the trial Judge on which he could be satisfied either by inference or otherwise that the appellant had sold the properties on 10 August, with intent to obstruct or delay the execution of any judgment which might be made against him.

[3] The fact that the appellant had been convicted by the High Court together with others on criminal charges from the transactions which were among the subject matter of the civil proceedings before the Court and that an appeal against conviction was then pending in the Federal Court does not help the respondents to prove the necessary intention of the appellant in view of the nature of the sale transaction. The result of the criminal case would not directly affect the civil proceedings.

[4] Fresh evidence should not be introduced at the hearing of an application to set aside the *ex parte* order made in chambers.

[5] The order requiring the appellant to declare all his assets and the order of injunction are clearly outside the scope of the Debtors Ordinance.

[6] The appeal is allowed and all the *ex parte* orders set aside; the respondents to pay the costs.

[Appeal allowed with costs.]

Cases referred to:

Kepong Prospecting Ltd v. Schmidt [1962] MLJ 375

Nanyang Development (1966) Sdn. Bhd. v. Malaysian Armed Forces Co-operative Housing Society Ltd [1972] MLJ 149

Munns v. Longden 32 WR 675

Legislation referred to:

Debtors Ordinance 1957, s. 19, (1)(c)

For the appellant/2nd defendant - K.L. Rekhraj and Puan Zaitoon Othman

For both the respondents - Mohamed Ismail

JUDGMENT

Mohd. Azmi J:

This is an appeal against the decision of a Judge dated 23 January 1978 dismissing the appellant's application to set aside an *ex parte* order of attachment before judgment made on 16 November 1977 in respect of the movable properties of the appellant subject to a limit of RM8.3 million. The *ex parte* order of 16 November was made pursuant to s. 19(1)(c) of the Debtors Ordinance 1957, at the instance of the two respondents who are the plaintiffs in

Kuala Lumpur High Court Civil Suit No. 2110/1977 in which the appellant as second defendant is being sued with four others, namely Datuk Harun bin Haji Idris (first defendant), Ismail bin Din (third defendant), Tinju Dunia Sdn Bhd. (fourth defendant) and Citibank N.A (fifth defendant). By paragraph 1 of the statement of claim endorsed in the general writ of summons issued on 22 July 1977 in reference to the said civil suit the first respondent's claim against the appellant, the first and third defendants jointly and severally, is for the sum of RM7.7 million and by para. 4, the second respondent's claim against the appellant is for the sum of RM8.3 million or such other sum as may be found due for loss caused or occasioned to the second respondent by him by breach of trust, alternatively by breach of fiduciary duties or further alternatively by fraud committed on the second respondent.

The respondents' summons in chambers dated 14 November 1977, which was heard *ex parte* in chambers, was supported by two affidavits one sworn by Ibrahim bin Hashim, the general manager and secretary of first respondent bank, and the other by Zubir bin Haji Dahan, the Acting Secretary of second respondent company. Based on these two affidavits, it is argued by Mr. Rekhraj, counsel for the appellant, that there was insufficient evidence on which an order of attachment before judgment could have lawfully been made. It is also argued before us that the other *ex parte* orders made on the same date directing the appellant to declare on oath full particulars of his movable and immovable properties (order No. 2) and an injunction restraining the appellant until the trial of the civil suit from exercising any powers or rights which he might have as a director or shareholder in any company (order No. 3) are beyond the scope of s. 19 of the Debtors Ordinance.

The part of s. 19 (1)(c) Debtors Ordinance 1957 with which we are concerned, reads as follows:

> If it is shown to the satisfaction of the Court, at any time after the issue of a writ of summons, by evidence on oath, that the plaintiff has a good cause of action against the defendant, and that the defendant, with intent to obstruct or delay the execution of any judgment which has been or may be made against him, has removed, or is about to remove, or has concealed, or is concealing, or making away with or, handing over to others, any of his movable or immovable property; the Court may order that the property of the defendant, or any part thereof, be forthwith seized or attached by the appropriate officer as a pledge or surety to answer the just demand of the plaintiff, until the trial of the action and satisfaction of any judgment that may be made against the defendant but such order shall not constitute the plaintiff a secured creditor if the defendant is adjudicated bankrupt.

In this appeal, we agree with the legal proposition that s. 19(1) (c) Debtors Ordinance 1957 does not debar a man from dealing with his property merely because a suit has been filed against him. Otherwise, in every case in which a suit is brought against a man, if during the pendency of the proceedings, he sells some of his property, that would be at once a sufficient ground to satisfy the Court that he is disposing of his property with intent to defraud the plaintiff. There must be additional circumstances before the Court can be satisfied that such an intention exists. (See *Kepong Prospecting Ltd. v. Schmidt* [1962] MLJ 375.)

The main issue for determination in this appeal is whether there was any evidence or sufficient evidence based on the affidavit of Ibrahim bin Hashim and affidavit of Zubir bin Haji Dahan, both sworn on 14 November 1977 that (a) the respondents had a good cause of action against the appellant; (b) the appellant had handed over a great deal of his property or money to others; and (c) he did so with intent to obstruct or delay any judgment the respondent might have. Zubir's affidavit is merely an adoption of the affidavit sworn by Ibrahim, and as such the present appeal will stand or fall on Ibrahim's affidavit. On the face of this affidavit, there was clearly sufficient evidence before the learned Judge to be satisfied with (a) that the respondents had a good cause of action against the appellant for breach of trust, breach

of fiduciary duties and breach of contract of service. What is not clear is whether there was evidence on which the learned Judge could be satisfied as regards (b) and (c), i.e. that the appellant had handed over a great deal of his property or money to others with intent to obstruct or delay any judgment the respondents might obtain from Civil Suit No. 2110 of 1977. From para. 7 of Ibrahim's affidavit, the appellant or companies in which he had a controlling interest, owned the following known properties:

(1) Appellant's residence at No. 34A Jalan Tengku Ampuan, Taman Duta, Kuala Lumpur, and the property adjacent to it.

(2) Properties known as No. 197 and 199, Jalan Ampang, Kuala Lumpur.

(3) Land held under EMR 2396, for Lot 273 in the Mukim of Ampang.

(4) A piece of land in Port Dickson.

(5) Shares in -

(a) Belmont Properties Sdn. Bhd.

(b) Manville Corporation Sdn. Bhd.

(c) Mona Sdn. Bhd.

(d) Kuala Lumpur Kepong Bhd.

(e) Benaan Muda Properties Sdn. Bhd.

(f) Taman Riang Properties Sdn. Bhd.

(g) Belmont Management Services Sdn. Bhd.

(6) A piece of land in Ulu Kelang.

There is no evidence as to what is the total approximate value of all these assets, but we assume it must be substantial and more than sufficient to satisfy any judgment the respondents might obtain in Civil Suit No. 2110 of 1977. Be that as it may, the assets which the appellant is alleged to have disposed with intent to obstruct or delay the execution of any judgment is property No. 5(b), viz. shares in Manville Corporation Sdn. Bhd., a company in which the appellant owned a controlling interest. The transaction complained of is contained in para. 9 of Ibrahim's affidavit. Although the appellant did not dispose of his shares in the Company, by selling the Company's assets, he had adversely reduced the value of the shares. That must have been the real complaint of the respondents. The impugned transaction involved the sales of six parcels of land in Kuala Lumpur (Grant Nos. 3563, 3556, 3557, 3565, 3566 and 3558 for Lot Nos. 269, 261, 262, 587, 588 and 263 respectively in Mukim of Ampang) by Manville Corporation Sdn. Bhd. to Madison Garden Sdn. Bhd. on 10 August 1977, i.e. about two months after the writ in Civil Suit 2110/77 was filed and served on the appellant. What has not been disclosed in Ibrahim's affidavit is the nature of these sales. In our view, this is fatal to the respondents' application for the *ex parte* order in view of the fact that evidence of intention to obstruct or delay on the part of the appellant could only be inferred or drawn from the 10 August transaction. See *Nanyang Development* (1966) *Sdn. Bhd. v. Malaysian Armed Forces Co-operative Housing Society Ltd.* [1972] 2 MLJ 149. From subsequent affidavits, it has now come to light that the sales by Manville Corporation to Madison Garden Sdn. Bhd. were not ordinary sales from which an intention to obstruct or delay could obviously be drawn.

The six parcels of land and another property EMR 2396 Lot 273 in the Mukim of Ampang were charged by Manville Corporation to Kwong Yik Bank Berhad and Malayan Banking Berhad to secure loan facilities, and power of attorney in respect of the properties charged was granted to the two banks as early as 11 October 1976, i.e. more than nine months before the filing of the writ against the appellant, empowering the two banks to sell the properties charged for the settlement of outstanding loans. In fact, the six parcels of land were first charged to Kwong Yik Bank in April 1973. The sales were necessary to avoid a foreclosure proceeding by the two Banks against Manville Corporation in respect of unpaid loan. Out of the proceeds of sale of RM4 million, Kwong Yik Bank took RM3 million and Malayan Banking RM900,000. In the circumstances, it is our view that there was insufficient evidence on oath before the trial Judge on which he could be satisfied either by inference or otherwise that the appellant had sold the properties on 10 August with intent to obstruct or delay the execution of any judgment which might be made against him. In our view, the fact that the appellant had been convicted by the High Court in Kuala Lumpur together with the first and third defendants on criminal charges from the transactions which are among the subject matter of these proceedings and an appeal against conviction was then pending in the Federal Court, does not help the respondents to prove the necessary intention of the appellant in view of the nature of the sale transaction. As correctly stated by deponent Ibrahim in para. 5 of his affidavit, the result of the criminal case would not directly affect the present civil proceedings. Although in subsequent affidavit of Ibrahim sworn on 17 January 1978 it was disclosed that appellant had also disposed of property No. (1), viz, his residence at No. 34A Jalan Tengku Ampuan, the transfer of the matrimonial home was in fact to his own wife in respect of a quarter share and the remaining three-quarter share to her as trustee, the consideration being natural love and affection. It was transferred on 17 April 1976 whilst the criminal prosecution was pending against the appellant, and it was about a year and three months before the writ in Civil Suit No. 2110/1977 was filed. But this 1976 transfer, which could have been discovered from the Land Office Registry, was not disclosed to the learned Judge when the *ex parte* order was made, and as such he could not have exercised his discretion in matters unknown to him. Having considered the decision of *Munns v. Longden* 32 WR 675, we are satisfied that in the circumstances of this case fresh evidence should not be introduced at the hearing of an application to set aside the *ex parte* order made in Chambers.

Accordingly, we allow this appeal, and set aside all the *ex parte* orders made on 16 November 1977. The order requiring the appellant to declare all his assets and the order of injunction are clearly outside the scope of the Debtors Ordinance. The respondents must pay the costs.

Also found at [1982] CLJ 238